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SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

2010 APR 13 AM 10:50

JEANNE HICKS, CLERK

BY: B. Hamilton

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11 Attorneys for Defendant

12 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
13 IN AND FOR THE COUNTY OF YAVAPAI

14 STATE OF ARIZONA,

15 Plaintiff,

16 vs.

17 STEVEN CARROLL DEMOCKER,

18 Defendant.

) No. P1300CR20081339

) Div. 6

) **MOTION TO LIMIT EXPERT  
TESTIMONY REGARDING DNA  
EVIDENCE**

) (Oral Argument Requested)

19 Steven DeMocker, by and through counsel, hereby requests that this Court  
20 restrict how the results of DNA testing are communicated to the jury. The State may  
21 seek to introduce DNA evidence, including low volume and partial profiles.  
22 Although many of these profiles only contain results at a few loci and some even  
23 contain alleles that do not correspond to Mr. DeMocker's profile, the State may want  
24 its experts to testify that these results are "inconclusive" or somehow "consistent  
25 with," or "cannot exclude" Mr. DeMocker's profile. Mr. DeMocker requests that the  
26 Court either exclude "inconclusive" results altogether or, in the alternative, limit the  
27 State's experts to testifying that the DNA evidence either "matches" or "excludes"  
28 Mr. DeMocker or that the expert cannot form an opinion from a particular sample.  
This motion is supported by the following Memorandum of Points and Authorities.

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1       The seriousness of this problem has been recognized by the country's leading  
2 forensic science experts. In 2009, after over two and half years of study and research,  
3 the National Academy released an exhaustive and fully documented report entitled  
4 "Strengthening Forensic Science in the United States: A Path Forward." National  
5 Research Council, Strengthening Forensic Science in the United States (The National  
6 Academies Press 2009) (hereafter the "NAS Report") (hereafter the "NAS Report").  
7 The Report details serious flaws in the scientific reliability and reporting of forensic  
8 testing and suggests sweeping reform. The Report states that "if the scientific  
9 evidence carries a false sense of significance ... the jury or court can be misled, and  
10 this could lead to wrongful conviction or exoneration. If juries lose confidence in the  
11 reliability of forensic testimony, valid evidence might be discounted, and some  
12 innocent persons might be convicted or guilty individuals acquitted." See NAS  
13 Report at 37.

14       The use of terms such as "inconclusive," "consistent with, or "cannot exclude"  
15 are potentially incredibly misleading to laypeople. Inconclusive can mean that there  
16 was not enough DNA from which results can be drawn. It can also signify that there  
17 were matches at some points and no data for others. Or it could even reflect that there  
18 are nonmatches at several points that the expert hypothesizes is due to the dropout of  
19 an allele or to some other artifact. The same can be said terms like "consistent with"  
20 and "cannot exclude." All of these terms are susceptible to varying interpretations  
21 and, therefore, are unsuited for testimony in a capital case.

22       In one recent study specifically analyzing the impact of variances in language  
23 on the relative importance of the evidence inferred by jurors, the authors found:

24       Clearly, the language employed by forensic experts affects the  
25 inferences fact finders draw, sometimes producing conclusions in the  
26 minds of fact finders quite different from what the expert witnesses  
27 purportedly intend. More subtly, even slight variations in how an  
28 expert's testimony is structured or the words used can significantly  
affect the understanding fact finders' draw from it. And, unfortunately,  
cross-examination and the use of opposing experts do not appear to

1 effectively counter expert testimony, regardless of the logical  
2 vulnerability of the initial expert testimony.

3 Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion*  
4 *Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings  
5 L.J. 1159, 1189 (2008).

6 For precisely this reason the Massachusetts Supreme Judicial Court found that  
7 it was prejudicial for the trial court to admit testimony regarding inconclusive DNA  
8 evidence. According to the Court, “[t]he testimony regarding inconclusive DNA  
9 evidence, when phrased as it was here, was, at a minimum, prejudicial. It suggested to  
10 the jury that Nesbitt and Brault were linked to the blood (after all, they “couldn’t be  
11 excluded” as potential matches).” *Com. v. Nesbitt*, 452 Mass. 236, 253-254 (2008)  
12 (where DNA evidence was insufficient to provide results). The Court determined that  
13 “for inconclusive DNA evidence to be admissible, it must be probative of an issue of  
14 consequence in the case.” *Id.* A Texas court took the same position. When the  
15 appellant argued that the trial court had incorrectly determined that appellant’s post-  
16 conviction DNA test results were not favorable, the Court of Appeals upheld the  
17 finding of the lower court. The Court of Appeals found that inconclusive DNA  
18 results are not likely admissible because they are not relevant. *Baggett v. State*, 110  
19 S.W.3d 704, 707 (Tex. App. 2003). The Court stated:

20 Only “relevant” evidence is admissible at trial. Tex.R. Evid. 402  
21 (Vernon Supp.2002). “Relevant evidence” is defined as evidence having  
22 “any tendency to make the existence of any fact that is of consequence  
23 to the determination of the action more probable or less probable than it  
24 would be without the evidence.” *Id.* at 401. Here, the evidence is  
25 “inconclusive”; thus, it does not make “more or less probable” the fact  
26 that appellant was the source of male pattern DNA found in D.F.

27 *Id.* Similarly, any “inconclusive” DNA results in this case are not relevant to  
28 whether Mr. DeMocker killed the victim, but because of the multiple interpretations  
this term is subject to, allowing the jurors to hear that evidence is “inconclusive” will  
unduly prejudice Mr. DeMocker while not providing any probative value.

1 Furthermore, because testimony regarding "inconclusive" results is not  
2 relevant, it is not admissible pursuant to Rule 702. Rule 702 states: "If scientific,  
3 technical, or other specialized knowledge will assist the trier of fact to understand the  
4 evidence or to determine a fact in issue, a witness qualified as an expert by  
5 knowledge, skill, experience, training, or education, may testify thereto in the form of  
6 an opinion or otherwise." Ariz. R. Evid. 702. "Inconsistent" results that can neither  
7 link Mr. DeMocker to the crime nor exclude him do not assist the trier of fact in any  
8 way and, therefore, are inadmissible.

### 9 Conclusion


10 Juries tend to have difficulty comprehending the details of STR and Y-STR  
11 DNA analysis. Instead, juries tend to want to rely on strong scientific evidence to  
12 support their impressions and conclusions about the guilt of the accused. In this case,  
13 the jury should be told that to whatever extent biological evidence has been found,  
14 that evidence excludes Steven DeMocker or the expert is able to form no opinion  
15 from the results. The court has the power to either exclude testimony regarding  
16 "inconclusive" DNA results or to require experts to restrict their testimony to  
17 language calculated not to result in prejudice. The inconsistent use of phrases such as  
18 "inconclusive," "could not eliminate," or "could not exclude," are all fraught with  
19 potential to mislead and misinform a jury. With this in mind, Mr. DeMocker requests  
20 that this Court issue an order requiring that all DNA experts testify that test results  
21 "match" Mr. DeMocker, "exclude" Mr. DeMocker or that the expert testify that he or  
22 she can form no opinion.

23 Once we have the latest DNA results, we will be in a position to advise the  
24 Court, first, of what circumstances would warrant preclusion or some other sanction  
25 for late disclosure. Once we have interviewed the DPS and Sorenson expert witnesses  
26 we will be in a position to move with more specificity to exclude particular testimony  
27 proposed by the State. It is also important to note at this stage that it is possible that  
28

1 the State will attempt to argue other inferences from the DNA results that may also be  
2 unwarranted by any scientific support, such as the suggestion that the complete male  
3 profile (Item 603) found under the victim's left hand fingernails could have been the  
4 result of incidental contact (so-called "touch" DNA) or that the DNA could have been  
5 placed there during the autopsy by the negligent use of contaminated nail clippers. At  
6 this juncture, we do not know what opinions the State's witnesses might wish to  
7 present, but we anticipate that any such testimony would also become the subject of  
8 motions to exclude or limit the testimony of the State's witnesses.

9 DATED this 13th day of April, 2010.

10 By:

  
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14 OSBORN MALEDON, P.A.  
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Attorneys for Defendant

19 **ORIGINAL** of the foregoing hand delivered for  
20 filing this 13<sup>th</sup> day of April, 2010, with:

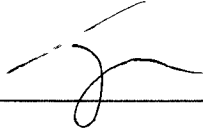
21 Jeanne Hicks  
22 Clerk of the Court  
23 Yavapai County Superior Court  
120 S. Cortez  
Prescott, AZ 86303

24 **COPIES** of the foregoing hand delivered  
25 this 13<sup>th</sup> day of April, 2010, to:

26 The Hon. Thomas B. Lindberg  
27 Judge of the Superior Court  
28 Division Six  
120 S. Cortez  
Prescott, AZ 86303

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Joseph C. Butner, Esq.  
Prescott Courthouse basket

A handwritten signature in black ink, appearing to be 'J. Butner', is written over a horizontal line that spans the width of the text area.